



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 10, 2003

Mr. Brian L. Rose
Assistant General Counsel
Harris County
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2003-0887

Dear Mr. Rose:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#176236.

The Harris County District Attorney (the "D.A.") received a request for any and all documents relating to sustained internal affairs cases at the Harris County Sheriff's Department (the "department") from January 1, 1999, to the present [November 12, 2002]. Although you state that correspondence from the D.A.'s office to the department will be produced to the requestor, you claim that the submitted information is excepted from disclosure by sections 552.101, 552.103, and 552.108 of the Government Code, as well as article 20.02 of the Texas Code of Criminal Procedure. We have considered your arguments and reviewed the representative sample of information submitted to this office.¹

Initially, we address your argument that some of the submitted information was obtained pursuant to a grand jury subpoena and is thus not subject to disclosure as grand jury information. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. Additionally, this office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988); *see also* Gov't Code § 552.003. When an individual or entity acts at the direction of the grand jury as its

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. ORD 513 at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* A review of the submitted information reveals that Exhibit C was obtained by the D.A. pursuant to a grand jury subpoena which requests sustained internal affairs investigations from January 1, 1999, to the present date, which, according to the signature of the Assistant District Attorney on the face of the subpoena is August 21, 2001. Although you claim that Exhibit B is similarly obtained in response to a grand jury subpoena, we note that Exhibit B, pertains to an investigation conducted in 2002, and is thus not responsive to the grand jury subpoena submitted as Exhibit A. Therefore, as Exhibit C was obtained by the D.A. pursuant to a grand jury subpoena, the D.A. must withhold Exhibit C from disclosure.

We next address the D.A.'s obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Whether a submission is timely is determined by section 552.308, which provides in pertinent part:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period . . . the requirement is met if the document is sent to the person by first class United States mail properly addressed with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within that period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

Gov't Code § 552.308(a). You state that the D.A. received the present request on November 12, 2002. The D.A.'s request for a decision from this office was dated November 25, 2002, and was received by this office via Federal Express on December 2, 2002. As this submission was not received via United States mail and did not bear a post office cancellation mark indicating that it was mailed on or prior to November 26, 2002, we find that the D.A. failed to request a decision from our office within the ten-business-day deadline set forth in section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to

overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You contend that the submitted information is excepted under sections 552.101, 552.103, and 552.108 of the Government Code. However, you have not demonstrated a compelling reason for withholding this information under section 552.103 or 552.108. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived); *but see* Open Records Decision No. 586 (1991) (when a governmental body fails to timely seek an attorney general decision under the Public Information Act, the need of another governmental body may provide a compelling reason for withholding the requested information). Thus, none of the submitted information may be withheld under section 552.103 or 552.108. Nevertheless, portions of the submitted information must be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 150 (1976) (confidentiality provisions and exceptions designed to protect the interests of third parties can provide compelling reasons for overcoming presumption of openness).

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have marked the information that must be withheld under section 552.101 and common-law privacy.

You note that the submitted information includes information made confidential by section 1703.306 of the Occupations Code which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;

- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We agree that certain information was obtained through polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply. Accordingly, we have marked the information that is confidential pursuant to section 1703.306 of the Occupations Code and is therefore excepted from disclosure under section 552.101 of the Government Code.

You also note the existence of criminal records that are protected under section 552.101 as information that is made confidential by statute. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") must be withheld under section 552.101. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083.

Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See Open Records Decision No. 565 (1990).* Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. In addition, a governmental entity's compilation of a person's CHRI is protected under common-law privacy. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked the CHRI that must be withheld section 552.101 of the Government Code.

We note that some of the submitted documents consist of medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.004. Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370(1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the documents that consist of medical records and are therefore subject to the MPA. This information may be released only in accordance with the MPA.

Additionally, the submitted information contains social security numbers that may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if they were obtained or are maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). However, it is not apparent to us that the social security numbers

contained in the information at issue were obtained or are maintained by the D.A. pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the D.A. to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution the D.A., however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the D.A. should ensure that these numbers were not obtained or are not maintained by the D.A. pursuant to any provision of law enacted on or after October 1, 1990.

We also note that the submitted documents contain records that are protected under section 58.007 of the Family Code in conjunction with section 552.101 of the Government Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

The submitted information includes law enforcement records involving juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, we have marked the information that is confidential pursuant to section 58.007(c) of the Family Code and must therefore be withheld under section 552.101.

Additionally, the submitted documents contain emergency medical services ("EMS") records, access to which is governed by the provisions of section 773.091 of the Health and Safety Code. Open Records Decision No. 598 (1991). Section 773.091 of the Health and Safety Code, the Emergency Medical Services Act, provides:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Health & Safety Code § 773.091(a), (b), (g). The submitted documents include information regarding the treatment of a patient by EMS personnel. It does not appear that any of the exceptions to confidentiality set forth in section 773.092 of the Health and Safety Code apply. Accordingly, the D.A. must withhold the information we have marked under section 773.091(b) of the Health and Safety Code in conjunction with 552.101 of the Government Code, except for information described in section 773.091(g).

We also note that the submitted documents contain information protected by section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure the home addresses and telephone numbers, social security numbers, personal pager numbers, and family member information of peace officers, regardless of whether the officer elected confidentiality under section 552.024 of the Government Code. *See Gov't Code § 552.117(2). See also Open Records Decision No. 670 (2001) (providing that a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and family member information of a peace officer under section 552.117(2)).* The D.A. must withhold those portions of the submitted documents that reveal a peace officer's home address, home telephone number, social security number, personal pager number, and that reveals whether the officer has family members. The D.A. must also withhold the officer's former home addresses and telephone information. *See Open Records Decision No. 622 (1994).* We have marked the information that is subject to section 552.117(2) and must be withheld.

Lastly, we note that some submitted information is protected from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked the motor vehicle information that must be withheld under section 552.130.

In summary, the D.A. must withhold Exhibit C as information obtained pursuant to a grand jury subpoena. The D.A. must withhold under section 552.101 of the Government Code the information that we have marked as confidential under common-law, section 1703.306 of the Occupations Code, section 773.091 of the Health and Safety Code, and section 58.007 of the Family Code. The D.A. must also withhold the criminal history information we have marked that is confidential under section 411.083 and *Reporters Committee*, the personal information that we have marked under section 552.117(2), and the motor vehicle information that we have marked under section 552.130. The D.A. may release the information that we have marked as subject to the MPA only in accordance with the MPA. Lastly, prior to releasing any social security numbers, the D.A. should ensure that these numbers were not obtained or are not maintained by the D.A. pursuant to any provision of law enacted on or after October 1, 1990. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 176236

Enc: Submitted documents

c: Mr. Jeremy Rogalski
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